No. 87-1252

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

H.J. INC., a Minnesota corporation, KIRK DAHL, LARRY KRUGEN and MARY KRUGEN, individually and d/b/a PHOTO IMAGES, SUSAN DAVIS, ROBERT NEAL, ISAAC H. WARD, RICHARD L. ANDERSON, THOMAS J. MOTT, and all others similarly situated,

Petitioners,

vs.

NORTHWESTERN BELL TELEPHONE COMPANY, a subsidiary of U.S. West, A.B.C. individually and D.E.F. as corporations, and other unnamed Co-conspirators,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent Northwestern Bell Telephone Company respectfully submits this brief in opposition to petitioners' petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

RESTATEMENT OF THE CASE

A. Proceedings Below

This action was commenced in July 1986 on behalf of a purported plaintiff class of all purchasers of "telecommunications goods and services" from respondent Northwestern Bell Telephone Company ("Northwestern Bell") between 1980 and 1986. Petitioners alleged that Northwestern Bell had engaged in dealings with members of the Minnesota Public Utilities Commission ("the MPUC" or "the Commission") that constituted bribery in violation of the

Minnesota criminal bribery statute, Minn. Stat. § 609.42. They claimed a right of action for damages on account of this alleged activity both directly under the Minnesota statute and on the theory that, because of the alleged bribery, Northwestern Bell had violated several provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. In a single allegation applicable to all legal theories, petitioners averred that the supposed violations injured all members of the alleged class in that the rates each of them was required to pay for Northwestern Bell's services pursuant to orders of the MPUC exceeded the rates that were "fair and reasonable"; petitioners sought to have the trial court determine what were "fair and reasonable" rates

and award them as damages their payments in excess of those court-determined rates.

Northwestern Bell filed an answer denying that it had violated any law in its dealings with the MPUC. It then moved to dismiss all or various parts of petitioners' first amended complaint on a number of different grounds.

By Order dated November 21, 1986, the District Court granted respondent's motion. The District Court ruled on only three of the numerous grounds for dismissal urged by Northwestern Bell.[1] It held:

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1 Grounds for dismissal asserted by Northwestern Bell but not adjudicated by

(FOOTNOTE Continued On Next Page)

(1) that the averments of the first amended complaint failed to state a "pattern of racketeering activity" under RICO; (2) that petitioners' allegations under section 1962(a) of RICO failed to state a claim, in that Northwestern Bell was alleged to be

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1 (FOOTNOTE Continued From Previous Page)

the District Court included, inter alia, the contentions that the MPUC is not an "enterprise" within the meaning of 18 U.S.C. §§ 1962(b) and (c); that Northwestern Bell does not have the necessary "interest in or control of" the MPUC within the meaning of section 1962(b); and that Northwestern Bell is not "employed by or associated with" the MPUC within the meaning of section 1962(c). Northwestern Bell also argued to the District Court that petitioners' effort to revise telephone rates collaterally, if not barred altogether by the "filed rate" doctrine, at least raised factual issues within the primary jurisdiction of the MPUC, and that this action should be dismissed or stayed pending the MPUC's exercise of its jurisdiction.

both the "person" and the "enterprise" under that section; and (3) that, even if petitioners had adequately alleged violations of RICO, their claims under the statute were barred by the "filed rate" doctrine, because they sought to have the trial court establish that the "reasonable" rates for respondent's services were something other than the rates promulgated by the MPUC. 648 F. Supp. 419 (D. Minn. 1986). Accordingly, the District Court dismissed petitioners' RICO claims with prejudice.[2]

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2 The District Court declined to exercise pendent jurisdiction over petitioners' claim for alleged violation of the Minnesota bribery statute, which it dismissed without prejudice.

Plaintiffs made a timely motion pursuant to Rule 59(e), F.R.Civ.P., to "alter or amend" (i.e., reconsider) the judgment of dismissal. The District Court denied that motion by Order dated February 18, 1987. 653 F. Supp. 908 (D. Minn. 1987).[3]

Thereafter, petitioners appealed to the United States Court of Appeals for the

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3 Petitioners did not seek leave to replead their RICO allegations when they moved for reconsideration of the District Court's judgment of dismissal. After their suit was dismissed, petitioners filed a virtually identical action in state court, again making no material revision in their RICO claims. H.J. Inc., et al. v. Northwestern Bell Corp., et al., No. 86-24166 (Minn. Dist. Ct., 4th Jud. Dist., Lebedoff, J.). Petitioners' state court action likewise has been dismissed by the trial court, and that dismissal is presently pending on appeal before the Minnesota Intermediate Court of Appeals.

Eighth Circuit. On September 22, 1987, the Court of Appeals filed its opinion affirming the District Court based on petitioners' failure to allege a RICO "pattern of racketeering activity." 829 F.2d 648 (8th Cir. 1987). On October 23, 1987, petitioners' petition for rehearing and rehearing en banc was denied by the Court of Appeals. Petitioners now seek a writ of certiorari from this Court.

B. Factual Allegations

Because this action was disposed of on the pleadings in the District Court, there is no factual record. As the Court of Appeals recognized, of course, because petitioners' first amended complaint was dismissed pursuant to Rule 12(b)(6), F.R.Civ.P., the facts alleged in that

complaint must be viewed "in the light most favorable to them" (829 F.2d at 649). However, Northwestern Bell emphatically denies any illegality in its dealings with the MPUC and is confident that, if this action ever were brought to trial, petitioners' allegations would be shown to be factually as well as legally groundless.

In essence, petitioners' first amended complaint averred that Northwestern Bell provided bribes to certain members of the MPUC so as to influence the Commission's actions and enable Northwestern Bell to overcharge consumers of telephone services

in the State of Minnesota.[4] All of the purported predicate acts of racketeering

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4 Petitioners' first amended complaint (¶ 30) stated that Northwestern Bell "has attempted to, or did offer, gave or promised to give, directly or indirectly, to the public officials who were duly appointed commissioners of the Public Utilities Commission, benefits, rewards, and consideration, to which they were not legally entitled, with the intent to influence such officers with respect to the performance of their powers and duties as such officers of said commission." The supposed instances of such activity by Northwestern Bell were set forth in paragraphs 31 through 42 of the first amended complaint, and each such instance was utilized as a purported predicate act of bribery for purposes of petitioners' RICO claims under 18 U.S.C. §§ 1962(a)-(d) alleged in counts II through V. Petitioners asserted injury in their business or property on the basis that "the compensation Northwestern Bell was allowed to receive by the [MPUC] was in excess of what would be fair and reasonable charges to [petitioners] and members of the class, and that said unfair and unreasonable compensation was caused by the involvement in bribery, attempts to bribe, conspiracy and racketeering activities alleged in [the first amended] complaint" (¶ 75).

activity in which Northwestern Bell allegedly engaged were substantively of the same nature and for the same purpose according to petitioners' first amended complaint. Fairly read, petitioners' first amended complaint contended that Northwestern Bell participated in a single criminal scheme comprised of multiple acts of bribery for a common objective, resulting in petitioners' claimed injury. The courts below simply refused to compartmentalize and segregate the alleged predicate acts artificially in order to manufacture a "pattern of racketeering activity."

REASONS FOR DENYING THE WRIT

I. Any Confict That Exists Among The Circuits Regarding The Interpretation Of The RICO "Pattern" Requirement Need Not Be Resolved By This Court

Petitioners argue that the Courts of Appeals have taken varying approaches in construing the "pattern of racketeering activity" requirement of RICO. While it is true that their interpretation of "pattern" has not been uniform, this Court made clear in Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985), that, as to "defect[s] . . . inherent in the statute as written, . . . correction must lie with Congress." Indeed, the Court in Sedima challenged "Congress and the courts to develop a meaningful concept of 'pattern'" (id. at 500), emphasizing that, "while two acts [of racketeer-

ing activity] are necessary, they may not be sufficient" to form a "pattern," and that it is the "'factor of continuity plus relationship which combines to produce a pattern'" (id. at 496 n.14).

In the aftermath of Sedima, the United States Court of Appeals for the Eighth Circuit has required that the element of "continuity" be established in order to allege adequately a "pattern of racketeering activity" within the ambit of the statute. Although petitioners contend that the Eighth Circuit's view of "pattern" is at odds with other federal courts, the United States Court of Appeals for the Tenth Circuit also has stressed the requisite combination of "continuity" and "relatedness" in order

to state a "pattern." See, e.g., Garbade v. Great Divide Mining and Milling Corp., 831 F.2d 212, 214 (10th Cir. 1987); Condict v. Condict, 826 F.2d 923, 927-929 (10th Cir. 1987); Torwest DBC Inc. v. Dick, 810 F.2d 925, 927-929 (10th Cir. 1987). Likewise, the United States Court of Appeals for the Second Circuit has demanded that the claimed RICO "enterprise" be sufficiently "continuous" to satisfy the Sedima standard. See, e.g., Creative Bath Products, Inc. v. Connecticut General Life Insurance Co., No. 87-7463 (2d Cir. Jan. 20, 1987), reported in BNA Civil RICO Report at 3 (Vol. 3, No. 34 Feb. 2, 1988); Albany Insurance Co. v. Esses, 831 F.2d 41, 44 (2d Cir. 1987); Furman v. Cirrito, 828 F.2d 898, 902-903 (2d Cir. 1987);

Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 51-52 (2d Cir. 1987), cert. denied, _____ U.S. _____, 98 L. Ed. 2d 650 (1988). The Eighth Circuit's approach to the RICO "pattern" requirement is consistent with the statutory language as interpreted by this Court in Sedima, and is in keeping with the attempts of other Courts of Appeals to ensure that the factor of "continuity" is present and thus that the limiting, mandatory concept of "pattern" is "meaningful."

The Eighth Circuit's treatment of the "pattern" element has been presented to this Court on several occasions, and in each instance the requested writ of certiorari has been denied. See, e.g., Madden v. Gluck, 815 F.2d 1163 (8th Cir.), cert. denied, ____ U.S. ____,

98 L. Ed. 2d 48 (1987); Holmberg v. Morrisette, 800 F.2d 205 (8th Cir. 1986), cert. denied, ____ U.S. ____, 95 L. Ed. 2d 526 (1987). Similarly, this Court, following its admonition that Congress must act to correct deficiencies inherent in the statute, has denied certiorari in "pattern" cases arising from other Circuits. See, e.g., HMK Corp. v. Walsey, 828 F.2d 1071 (4th Cir. 1987), cert denied, ____ U.S. ____, 98 L. Ed. 2d 657 (1988); California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466 (9th Cir. 1987), cert. denied, ____ U.S. ____, 98 L. Ed. 2d 650 (1988); United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986), cert. denied, ____ U.S. ____, 97 L. Ed. 2d 736 (1987). Here, too, the writ of certiorari sought by petitioners should be

denied. The Courts of Appeals are continuing to develop the "pattern" requirement as suggested in Sedima, and intervention in that process by this Court at this time is unwarranted. If greater uniformity under RICO is to be achieved, it should be accomplished by Congress, as this Court has recognized.

II. This Case Is An Inappropriate Vehicle To Resolve Any Conflict That May Exist Among The Circuits As To The Meaning Of RICO's "Pattern" Requirement

Even if this Court were desirous of reconciling the varying approaches of the Courts of Appeals to the meaning of "pattern" under RICO, this case would be an inappropriate vehicle for that purpose. As acknowledged by the District Court, and upheld by the Court of Appeals, dismissal of petitioners' first amended

complaint (which concerned one alleged corporate perpetrator -- Northwestern Bell, one type of purported illegal activity -- bribery, one claimed target entity -- the MPUC, one supposed central objective -- obtaining remuneration in excess of "fair and reasonable" charges, and one unitary, identifiable group of alleged victims -- Northwestern Bell's Minnesota ratepayers) was commanded by and squarely in line with Eighth Circuit precedent construing RICO's "pattern of racketeering activity" requirement.

Nevertheless, in their motion for reconsideration of the Order of dismissal, petitioners asked the District Court to take cognizance of those factors and tests allegedly relied on by federal courts in other Circuits in analyzing the question of "pattern." In denying

petitioners' motion for reconsideration, the District Court did precisely as petitioners requested, and nonetheless came to the same conclusion, i.e., that their first amended complaint should be dismissed for failure to state a "pattern" (653 F. Supp. at 915-916):

> "Even assuming that these factors have relevance, the Court would still be constrained to find that [petitioners] have not alleged a pattern of racketeering activity. [Petitioners] have alleged criminal activity of long duration. Whether [petitioners] have alleged the threat of continuing criminal activity is a closer question, particularly in view of the review by the MPUC of its past actions. [Petitioners] have alleged the presence of multiple victims, assuming that the body of Northwestern Bell ratepayers is not one corporate victim, but has not shown independent harmful significance, since it is the aggregate of predicate acts which produce their injuries. [Petitioners] have alleged various methods of commission. It cannot be said, however, that the alleged

> 'pattern' of predicate acts is a 'regular part of the way' [respondents] conduct their business. On balance, the Court finds that, applying the enumerated factors, [petitioners'] allegations do not fit the RICO paradigm."

Thus, even within the interpretation of "pattern" which they urged the District Court to apply, petitioners have not stated a claim under RICO on which relief can be granted.

Moreover, in addition to the "pattern" challenge raised by respondent, numerous other grounds were advanced to the District Court for dismissal of petitioners' action (see note 1, supra), and, while the District Court found it unnecessary to address many of respondent's arguments, it did find alternative bases for its decision in that (1) petitioners' RICO claim under 18 U.S.C. § 1962(a) was fatally defective

because of the identity of "person" and "enterprise," and (2) that the "filed rate" doctrine barred all of petitioners' RICO claims. See 648 F. Supp. at 426-429. Therefore, even if the "pattern of racketeering activity" issue were resolved in petitioners' favor, it would not save their first amended complaint from the fate of dismissal.

CONCLUSION

Petitioners' contentions have been fairly aired in both the federal courts and the courts of the State of Minnesota. It is time to give those contentions the repose they deserve. Further review by this Court is not justified. For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Dated: February 29, 1988

Respectfully submitted,

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